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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:	)	
Accounting for Judgments and Other Costs Associated With Litigation	)	CC Docket No 93-240

COMMENTS OF THE
UNITED STATES TELEPHONE ASSOCIATION

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SUMMARY

The best alternative in this proceeding is no rule, with the Commission reserving the right to address the accounting practices of carriers when a litigation situation of sufficient magnitude requires it. Any ratemaking issues can be addressed with a reasonableness assessment. USTA believes that a reconciliation of the twin Litton Costs and Litigation Rules decisions binds the Commission, and does not support the specific proposals in the NPRM. The Commission is not authorized to choose to rely on a case where dicta is favorable to its position, and to ignore a case or decision that is not. Further, regardless of how the Commission evaluates these two cases, such detailed rules are not merited in the current regulatory environment, because the burden will be significant and the benefit minimal.

If the Commission insists on adopting rules dealing with litigation expenses, it should focus on judgments in federal antitrust litigation, of sufficient magnitude to justify the significant accounting changes and the necessary reasonableness evaluation that is required under a framework that reconciles the Litton Costs and Litigation Rules decisions. Rules should not extend further. Assuming the Communications Act anticipates some antitrust expertise within the Commission, the Act's recognition of Commission expertise does not extend to the myriad other specialized areas where corporate litigation

normally takes place. Extension of new rules to those areas will invite an exhaustive series of assessments and tests involving the merits of inclusion or exclusion of the relevant costs for ratemaking purposes, and consuming public and private resources.

Finally, the Commission should not require the demanding new accounting conditions it proposes, as they are unworkable in practice, and are not consistent with generally accepted accounting principles and the Commission's own policies.

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The United States Telephone Association (USTA) respectfully submits these Comments in response to the Commission's Notice of Proposed Rulemaking (NPRM) in this proceeding, released September 9, 1993. USTA was a participant in the Commission's earlier proceedings on the ratemaking treatment of various types of litigation expenses, settlements and judgments,[1] and was an active intervenor in both of the D.C. Circuit cases identified by the Commission in the NPRM.[2]

The best alternative in this proceeding is no rule, with the Commission reserving the right to address the accounting practices of carriers when a litigation situation of sufficient magnitude requires it. Any ratemaking issues can be addressed

[1] Amendment of Part 31 to Account for Judgments and Other Costs Associated With Antitrust Lawsuits, CC Docket No. 85-64 (Litigation Costs proceeding).

[2] Mountain States Telephone and Telegraph Co. v. FCC, 939 F.2d 1021 (D.C. Cir. 1991) (Litton Costs decision), and Mountain States Telephone and Telegraph Co. v. FCC, 939 F.2d 1035 (D.C. Cir. 1991) (Litigation Rules decision).

with a reasonableness assessment. USTA believes that a reconciliation of the twin Litton Costs and Litigation Rules decisions binds the Commission, and does not support the specific proposals in the NPRM. The Commission is not authorized to choose to rely on a case where dicta is favorable to its position, and to ignore a case or decision that is not. Further, regardless of how the Commission evaluates these two cases, such detailed rules are not merited in the current regulatory environment, because the burden will be significant and the benefit minimal.

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Finally, the Commission should not require the demanding new accounting conditions it proposes, as they are unworkable in practice, and are not consistent with generally accepted accounting principles and the Commission's own policies.

I. THE FCC MUST ADHERE TO JUDICIAL PRECEDENT.

The instant proceeding did not arise sui generis, but arose out of a long history of developing law. Both the Litton Costs decision and the Litigation Rules decision rejected Commission orders on this subject and vacated them, thereby rendering them void and of no effect.[3] The Commission's action was found to be unlawful. That result alone makes it of little moment that these decisions rested on one or another basis; the extent of the problems identified by the two panels with the Commission's determination was large. The detail of the two decisions also is significant, however, in its own right.

Prior to the decisions of the D.C. Circuit, the Commission itself had dealt with the Litton Costs issues and the Litigation Costs issues in tandem. Before the two decisions adverse to it, the Commission explicitly sought to reconcile these matters and to assure that they would be consistent and

[3] Litton Costs decision, 939 F.2d at 1035; Litigation Costs decision, 939 F.2d at 1047.

not contradictory.[4] In fact, it was the Commission that linked the matters in the appeals court, by seeking to avoid review of its Litton Costs decision on the basis that affected carriers would have an opportunity to make their case for inclusion of specific litigation costs in ratemaking at some later date under the new litigation rules. The Litton Costs court had to address this argument in the course of deciding the case before it. Now, the Commission is straining to differentiate the cases and ignore one. That is neither appropriate nor legally correct.

While there were separate decisions in the Litton Costs matter and in the Litigation Costs matter, in fact they are reconcilable. Both decisions operate as judicial precedent that must be taken into account by the Commission in crafting any new rule here. The Commission is not at liberty to elect to follow one decision, and reject the other, or to follow one part of one decision, and to reject other parts of that decision. Surprisingly, in the NPRM, the Commission indicates explicitly that it intends to do just that - to follow the parts of the Litigation Costs decision that it agrees with, because those parts of the Litigation Costs decision are viewed

[4] See Litigation Costs, Reconsideration Order, 3 FCC Rcd at 503.

as being in accord with the Commission's preestablished position.[5] That is an inappropriate view of the law.

The Litton Costs decision and the Litigation Rules decision are reconcilable. Indeed, the decisions operate not only as precedent, but also operate in the nature of an estoppel against the Commission.[6] The Commission has the obligation to reconcile the decisions if it seeks to proceed in this area. It is not free to ignore a finding of the appeals court related to its activities that has been joined previously and that has been fully litigated. Both the Litton Costs decision and the Litigation Rules decision bind the Commission with respect to matters essential to their outcome.[7]

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[5] NPRM at ¶ 29.

[6] The Commission is not only bound by both cases, it should be prevented from seeking yet another test of the underlying judicial precedent in the hope that the D.C. Circuit will "finally get it right." The principle of collateral estoppel applies to the Federal government. Montana v. U.S., 440 U.S. 147, 59 L.Ed.2d 210 (1979); U.S. v. Mendoza, 464 U.S. 154, 78 L.Ed.2d 374 (1984). See also Lujan v. Defenders of Wildlife, __ U.S. __, 119 L.Ed.2d 351 (1992). This is an appropriate situation in which the underlying policies should apply to avoid the additional commitment of public and private resources to relitigate issues.

[7] Many of the D.C. Circuit statements cited by the Commission in support of its NPRM proposal are merely dicta. In line with traditional lines of legal analysis, they do not constitute binding precedent. In contrast, other holdings of the court, particularly in the Litton Costs case, were essential to the decision. They are thus not dicta. They bind the Commission.

In the Litton Costs case, the D.C. Circuit applied not only appeals court precedent, but Supreme Court precedent.[8] Much of the analysis in the Litton Costs case is fully applicable in this proceeding, and, being central to the court's rejection of the Commission's legal conclusions, must be adhered to in this proceeding. There are three such central conclusions in the Litton Costs decision:

(1) "Illegality of carrier conduct from which an antitrust litigation expense stems does not inexorably compel or warrant either rejection or stigmatization of the expense as a factor in rate calculations."[9] This statement clearly indicates that a rule cannot per se contaminate any carrier's costs and insulate them from consideration in rates.

(2) "...(A) pervasive element in ratemaking is reasonableness, which demands inquiry beyond the bare fact of antitrust violation."[10] This statement indicates that the test that should apply in any rule must be one of reasonableness, a test that applies across the board in traditional ratemaking.[11]

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[8] Litton Costs decision, 939 F.2d at 1030-31.

[9] Litton Costs decision, 939 F.2d at 1030-31.

[10] Litton Costs decision, 939 F.2d at 1031.

[11] Courts in the same position as the Commission with respect to the underlying Litton decision have concluded that the decision should not be given its normal effect within the confines of the law because it appeared that this Commission's staff itself wrote decisions designed to set a predicate for

(3) "By the Commission's formula, only if the carrier loses in the antitrust suit are the expenses thereof moved below the line, and only then does the presumption against their consideration in ratemaking come into play. Success or failure in the antitrust litigation thus becomes the sole determinant of these consequences, and the success-failure standard has met disfavor in parallel contexts."[12] This statement, taken into consideration with the appeals court analysis that followed it, shows that a "black-or-white" rule, in which

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antitrust liability, a situation viewed as unfair to the carrier involved. See Bell Atlantic Petition for Reconsideration, In Re: AT&T, et.al., Accounting Instructions for the Judgment and Other Costs Associated with the Litton Systems Antitrust Lawsuit, filed November 1, 1984, at 5, note 11, citing district court decisions in New Jersey and the District of Columbia, and quoting the Court in Glictronix Corp. v. AT&T, CA No. 82-4447 (D.N.J.), opinion issued October 4, 1984, at page 70. This is strong evidence that even adverse antitrust judgments may have a compelling basis in reason for regulators to continue to allow the amounts involved to be includible in ratemaking.

[12] Litton Costs decision, 939 F.2d at 1031-32 (emphasis added.) The Litton Costs court cited Supreme Court precedent holding, in one case, that litigation expenses should be deductible "without regard to the success of the defense," (Commissioner v. Heininger, 320 U.S. 467, 472, 88 L.Ed. 171, 176 (1943)) and stating, in another case, that "No public policy is offended when a man... employs a lawyer to help in his defense." (Commissioner v. Tellier, 383 U.S. 687, 694, 16 L.Ed.2d 185, 190 (1966), citing many other cases. (Emphasis added, in light of the separate finding of the Litigation Rules decision that there was not a public policy basis for the extension of the litigation rules beyond the antitrust context.))

See also Driscoll v. Edison Light and Power, 307 U.S. 104 (1939), rehearing denied, 307 U.S. 650 (1939), in which the Supreme Court found that a utility should be able to include for ratemaking the fair and proper expenses of presenting its case to a regulatory commission in a proceeding to determine the reasonableness of rates, even if the rates are later found to be too high.

all preliminary expense is deemed acceptable or unacceptable on the basis of an uncertain condition subsequent - the result of the interplay of complex facts and economic theories, unable to be reasonably predicted - has been consistently rejected by the courts.[13]

Any Commission attempt to craft rules dealing with litigation expenses, settlements and judgments must respond to each of these three points, albeit such expenses, settlements and judgments need not all necessarily be handled in an identical manner. Nevertheless, a belated conclusion that some carrier's action did not comply with the antitrust laws cannot per se contaminate all of the earlier-disbursed expenses of the carrier related in any way to that act. A "reasonableness" inquiry must always be available for a carrier to defend an expense sought to be disallowed. And, a pure and retroactive "success-failure" test is not a lawful means by which expenses can be disallowed. As the Litton Costs court stated, the Commission's legal rationale for its broad position simply did not "find a safe haven in the caselaw."[14]

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[13] "In this day of litigation explosion, the cost of defending against a variety of actions, both governmental and private, is a necessary and reasonable expense to be included in the cost of doing business. Actions ... approach infinity in their number and variety." New England Telephone and Telegraph v. PUC, 459 A.2d 1381, 1384 (R.I. 1983).

[14] Litton Costs decision. 939 F.2d at 1033.

In the Litton Costs case, the court found, in addition to these disqualifying legal defects, that there were, in addition, no policy justifications for the disallowance of the Litton Case costs. That is, even if the Commission's decision could legally be made, the Commission also failed to show:

- the necessary reasoning behind its new litigation costs policy;[15]
- why its sudden change in policy to remove the affected costs from above-the-line accounting and to institute an immediate and strongly adverse presumption was better than the "time-tested traditional procedure featuring above-the-line accounting and a burden of justification only upon challenge;"[16]
- the reason that subsequent decisions about antitrust statutory violations should cause associated but previously incurred litigation expenses to be treated especially unfavorably, or for that matter, the reason any other specific federal statutory violations should do so;[17]

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[15] Litton Costs decision, 939 F.2d at 1034.

[16] Id.

[17] Id. The Litton Costs decision agreed with the carriers that "no one could possibly predict that defense of a lawsuit as difficult as Litton would be ultimately successful", and stated that, under the Commission's scheme, planning for such litigation would have to occur "in total ignorance of the factor the Commission deems critical - the final outcome of the case..." Litton Costs decision, 939 F.2d at 1033-34.

- how a carrier can operate efficiently under rules where necessary expenses are disallowed later even though they are recognized as "a recurring fact of life in operating a business", and will arise in a context that presents complex issues without clear precedent and standards, and that makes serious planning difficult or impossible;[18] and
- any rational connection between the record - showing a clear practical difficulty for carriers in pursuing litigation - and the result - rules relying only on the final outcome.[19]

In the Litigation Rules decision, the appeals court did not contradict the Litton Costs decision on any of these conclusions. If anything, it reinforced those conclusions. Among other things, the court explicitly found that the Commission did not justify the scope of its new rules and did not sufficiently consider their probable effects on the

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[18] Id. USTA filed pleadings in the prior Commission proceeding that noted that even in the antitrust context - particularly in "rule of reason" situations - an action cannot normally be viewed as unlawful until a verdict actually is entered on the merits. USTA Statement, in Litigation Expenses, CC Docket No. 85-64, filed August 5, 1987, at 2. An AT&T Petition for Reconsideration in that proceeding correctly noted that "Uncertainty and changing standards in antitrust can lead to liability for actions that appeared entirely lawful at the time they were undertaken. AT&T Petition for Reconsideration, in CC Docket No. 85-64, filed July 6, 1987, at 2.

[19] Id.

companies' incentives.[20] The court concluded there were "significant gaps" in the Commission's analysis.[21] This is more than the NPRM elects to acknowledge. The Commission has yet to fill these chasms of nonexistent analysis.

Other parts of the Litigation Rules court's holding that are entirely consistent with the Litton Costs decision are:

- The Commission did not justify application of its rules beyond the antitrust context at all.[22]
- There was no basis to extend the rules for antitrust cases to "all federal cases".[23]
- There was no explanation of the public policy implications of individual federal statutes that could be recognized by the court as a useful factor by which the Commission could analyze the handling of costs.[24]
- The new rules create perverse incentives for the pursuit of litigation, which would have to be resolved in any new Commission proceeding.[25]

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[20] Litigation Rules decision, 939 F.2d at 1037.

[21] Litigation Rules decision, 939 F.2d at 1042.

[22] Id.

[23] Id.

[24] Litigation Rules decision, 939 F.2d at 1045.

[25] Litigation Rules decision, 939 F.2d at 1046.

Thus, the NPRM is simply wrong in concluding that the Commission was reversed by two separate D.C. Circuit panels "for two limited reasons."[26]

II. THERE IS NO NEED FOR THE RULES PROPOSED IN THE NPRM.

The NPRM itself shows that there is no need for rules at this time, and that in this environment, having detailed rules will be more burdensome than the traditional practice, recognized by the Litton Costs court to be "time-tested." This established precedent was itself found acceptable by the Commission only two years before it began the Litigation Rules proceeding.[27]

The Commission itself has stated that the need for rules arose out of the Litton case.[28] It now submits that rules are necessary, not because of the Litton Costs case (the accounting for which was abandoned by the Commission at the same time this NPRM was released[29]), but because of other factors. It claims

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[26] See NPRM at ¶ 5.

[27] Litton Costs decision, 939 F.2d 1021 at 1034.

[28] NPRM at ¶ 2.

[29] See Order on Remand, terminating In the Matter of AT&T, et.al., Accounting Instructions for the Judgment and Other Costs Associated with the Litton Systems Antitrust Lawsuit, released September 27, 1993 and Report No. CC-544, released September 20, 1993. There, the Commission concluded that further action in the proceeding was unwarranted, and acknowledged that there could have been adverse ratemaking consequences for carriers that could have followed from its decision, and that would, in all likelihood, have been inconsistent with the court's analysis of

that books and accounts must be kept in accord with the rules of the Commission, even by price cap carriers. It also claims that price cap exchange carriers may need these rules because they are subject to sharing mechanisms. And, it claims that non-price cap exchange carriers are subject to regulation where the costs of litigation might otherwise be recovered by rates.

These justifications do not stand up under scrutiny. The Litton Costs case has been over for ten years, and no other cases have arisen which demand the institution of rules by the Commission. Indeed, the only case in which the Commission has been called on to determine the handling of antitrust litigation expense in the past decade has been a case involving Alascom, in which the Commission sought to apply the litigation rules to a settlement.[30] There, the factors that came into play showed how fact-intensive the entire process of ratemaking really is, justifying not a new set of additional rules, but instead the individual case "reasonableness" assessment endorsed by the Litton Costs court.

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the required ratemaking and accounting treatment.

[30] In Re: Alascom, Inc. Request for Ratemaking Recognition of an Antitrust Settlement, Memorandum Opinion and Order, DA 90-115, February 2, 1990; Memorandum Opinion and Order, DA 91-179, June 24, 1991. The decision regarding the recognition of parts of a modest settlement of a case involving three Alaska carriers, made in accordance with the Commission's vacated (but then-extant) litigation rules, required one Order of 30 paragraphs with 45 footnotes, and a second Order of 44 paragraphs and 68 footnotes. This is hardly the type of clear and efficient process to which the Commission points in this NPRM as justifying new rules.

As for the price cap justification, the Commission itself acknowledges that the costs of litigation do not affect the development of rates under price caps.[31] What the Commission does not acknowledge, and which is equally compelling, is the fact that the untethering of litigation costs from ratemaking in itself poses a significant additional impetus for carriers to carefully guard these costs. Carriers want to avoid the imposition of unnecessary costs of any type related to litigation. The strongest argument against any new rules is that the costs that once were feared would be left for ratepayers to pay are now in the first instance payable by the carriers themselves, without regard to ratemaking. If anything, that removes the basis for any rules. Any unnecessary costs must be assumed by those carriers, just as the rules were originally intended to have occur, however ill-targeted they actually were.

The possibility of sharing will not affect the carriers' cost consciousness. If anything, the issue of sharing underlines again the comment of the Litton Costs court that the Commission's initiative actually is unrelated to the efficiency motivations of carriers and will be disruptive rather than constructive.[32] Carriers will not choose to end a piece of litigation because it might or might not affect the sharing

[31] NPRM at ¶ 7.

[32] Litton Costs decision, 939 F.2d at 1034.

mechanism. That is peripheral. The direct costs of pursuing a litigation defense typically will be far in excess of the risk of sharing somewhere in the future. The motivation to resolve cases without unnecessary cost is already well established. And, not incidentally, there is some possibility that the new rules would operate to eliminate the ratepayer expectation of sharing in some cases, rather than promote it. The NPRM now represents a classic case of a solution in search of a problem.

The issues for the rate of return carriers are really no different in the current environment. There has yet to be a case where one of the exchange carriers not under price caps has had to deal with litigation cost recovery before the Commission. These entities are too small to waste their resources on frivolous extensions of litigation. Further, the market pressures brought upon them to avoid unnecessary costs by other carriers, who are their access customers and who are far larger, are significant. In the interstate arena, a matter that affects one small rate of return carrier is likely to affect others at the same time. The small rate of return carriers are incapable of successful individual attempts to monopolize any of today's national markets. With any such cases of significance, the Commission will be immediately aware of the commencement of litigation, and can determine then whether an order concerning accounting for litigation is

appropriate. The Commission can easily find a more narrowly drawn response to its regulatory concerns here.[33]

The absence of need is particularly apparent when the NPRM is matched against what the Commission has not done here or elsewhere. It has not proposed that there be litigation expense rules that apply to all of the other carriers who are subject to the Act's § 201 requirement that their rates be just and reasonable, and who presumptively include all of the costs that they incur in litigation, successful or not, in the prices they later charge for regulated services. There have been a multitude of cases involving interstate carriers who are not exchange carriers in which these entities have been found to violate federal statutes, or agreed to settlements, yet the Commission fails to extend its rules to these carriers. Further, if a carrier not subject to these rules brings a case against a carrier subject to these rules, it will have extremely strong leverage against the shareholders of the defendant carrier to exact a settlement - perhaps an otherwise

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[33] An agency's failure to consider logical alternatives that are more narrowly targeted to a problem it has identified is reversible error. Natl. Black Media Coalition v. FCC, 775 F.2d 342, 357 (D.C. Cir. 1985); Assoc. Gas. Distributors v. FERC, 824 F.2d 981, 1019 (D.C. Cir. 1987) ("(n)o case of which we are aware supports an industry-wide solution for a problem that exists in isolated pockets.") Further, an agency cannot ignore other ostensibly reasonable positions when its own choice suffers from significant flaws. City of Brookings Municipal Telephone Co. v. FCC, 822 F.2d 1153, 1169 (D.C.Cir. 1987).

unjustified non-monetary settlement with strategic competitive implications.

It is arbitrary and capricious for the Commission to propose a rule purporting to address the concerns it has stated, without addressing the universe of carriers who also are required to file tariffs, or who offer interstate services in which the same costs found objectionable by the Commission are included.

Finally, the Commission has failed to propose the same type of rule for other entities subject to its jurisdiction and whose recent record in the area of antitrust law is far worse than the record of the Title II carriers. In this regard, the Congress has made findings concerning operators in the cable television industry, which findings are clear in recognizing the existence and misuse of market power.[34] Further, the Commission has been directed by Congress to adopt rules that will result in reasonable rates for cable television subscribers. Notwithstanding: (a) the findings by Congress, (b) the directive by Congress that the Commission adopt rules for reasonable cable rates, and (c) the demonstrated proclivity of cable operators to engage in activities that are of

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[34] See Cable Television Consumer Protection and Competition Act of 1992, P.L. 102-385, 106 Stat. 1460 (1992). See also H.R. Rep. No. 628, 102d Cong., 2d Sess.; S. Rep. No. 92, 102d Cong., 2d Sess.

questionable legitimacy under the antitrust laws, the Commission is doing nothing with respect to these entities' litigation costs and their impact on rates. Again, this sets up the carriers for strategic litigation by other entities seeking market advantages.

The only other rationale provided by the Commission is an example of pure bootstrapping. The NPRM states that rules are needed because carriers must keep books of account that are in accord with rules and policies of the Commission. Absent any NPRM, these carriers would remain in full compliance with that statement. This statement adds no further justification; instead, it punctuates the difficult search for any regulatory justification that can meet the appeals courts' expectations.

III. THE LITIGATION COST ACCOUNTING RULES PROPOSED IN THE NPRM SHOULD BE REJECTED.

Both the proposed interim and permanent rules for accounting related to litigation costs require that carriers use deferral accounting, even though the costs involved are actually incurred on an ongoing basis, and are not subject to recapture from any entity at any future time. The reasoning of the NPRM in this respect is unsound, on a number of bases.

First, such an accounting requirement would be inconsistent with generally accepted accounting procedures (GAAP). (They would therefore also be presumptively

inconsistent with the Commission's policies.[35]) Accrual accounting is required of carriers in the preparation of their financial statements by Financial Accounting Standards Board (FASB), and other related accounting standards-setting bodies. GAAP is consistent in its expectation that actual measurable cost outlays by carriers be recognized as expenses as they are incurred, absent some clear way to relate them to specific revenue and to allocate them systematically to that revenue over time.[36] As the Commission has adopted rules that require that carriers utilize GAAP in the first instance, the modification set out in the NPRM will result in an immediate and ongoing requirement for carrier action that deviates from the Commission's own prior policies.

Second, given the extended periods over which litigation is contested, deferral accounting would necessarily hold significant expense in an accounting "limbo" for those extended periods. This will distort cost-causer expectations, leaving to some future group of customers the burden or benefit of a carrier's litigation defenses, again in a way that is inconsistent with Commission statements in prior proceedings. Even more dangerous to carriers is the evident risk that the

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[35] Adoption of Generally Accepted Accounting Principles in the Uniform System of Accounts, CC Docket No. 84-469, See 95 FCC 2d 1435, 49 Fed. Reg. 21377 (1984).

[36] See FASB Statement of Financial Accounting Concepts No. 6, at ¶¶ 146-47., (dealing with GAAP underlying financial statement).

Commission, despite any good intentions, is increasingly unable to meet its regulatory responsibilities under the Hope-Bluefield standard to provide for adequate cost recovery to keep the carriers whole.[37] Although they may fully expect to prevail, the carriers will not know when the costs they have necessarily incurred will be recovered, if at all. Over the course of this proceeding, the Commission has continually failed to address this matter in a way that reflects business reality. As the Litigation Rules court stated, "(T)he carriers are being forced to forego revenues now. Moreover ... these revenues may be lost forever."[38]

Third, the NPRM perpetuates the problem recognized by the Litigation Rules court when it states that carriers might face a one-time lump sum charge at the conclusion of any litigation that is deemed adverse, but would be required to amortize the same amounts over a period of years if the carrier should prevail. Certainly, the political attractiveness of the Commission's unbalanced endgame is evident, but the legal rationale is absent. As the Litigation Rules court noted, the Commission's posture on this issue has continuously been one of "studied ambiguity."[39] That court recognized that the

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[37] See Hope v. Federal Power Commission, 320 U.S. 591 (1944); Bluefield Water Works v. PSC, 262 U.S. 679 (1923). See also Ohio Bell v. FCC, 949 F.2d 864 (6th Cir. 1991).

[38] Litigation Rules decision, 939 F.2d 1035 at 1041-42.

[39] Id.

Commission's clouded assurances would still raise extreme risk for carriers, who would fear that their cost recovery would be precluded by retroactive ratemaking concerns if they had to seek recovery of their accrued expenses in a period later than these expenses were actually incurred. Under the Commission's proposal, the accounting requirements could delay cost recovery beyond the Commission-defined accepted earnings period by many years. The court saw that the carriers' operations would face a "continuing hardship" that ultimately would result in no recovery at all - a one-way street going the wrong way.[40]

Finally, the Commission has shown no basis upon which it can conclude that a new policy is needed instead of using the existing Uniform System of Accounts, which remains robust enough to accommodate accounting for litigation costs. The Part 32 accounting rules parallel GAAP and offer a sound and straightforward means by which to track costs. Moreover, ratemaking itself should be kept out of Part 32. A "reasonableness" test within the ratemaking process protects the public interest. Permanent accounting rules are not necessary to protect the ratepayer when ratemaking adjustments can be made.

USTA specifically opposes the Commission's proposal to book antitrust litigation costs on an interim basis to Account

[40] Id. at 1035.